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NO. 95-1649

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF KANSAS,

Petitioner,

v.

LEROY HENDRICKS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF OF THE STATES OF WASHINGTON, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT and WYOMING, THE COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA, VIRGINIA and PUERTO RICO, THE DISTRICT OF COLUMBIA, THE TERRITORIES OF AMERICAN SAMOA and GUAM, THE NORTHERN MARIANA ISLANDS, and THE VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

In July 1990, after extensive hearings involving the testimony of over 200 witnesses, Washington State enacted the nation's first Sexually Violent Predator Statute. This statute was enacted as part of the Community Protection Act of 1990 and provides for the indefinite civil commitment of sexual offenders who are about to be released from confinement and who are determined to suffer from a mental abnormality or personality disorder "which makes them likely to commit predatory acts of sexual violence." Wash. Rev. Code § 71.09.020. In August 1993, the Washington Supreme Court rejected challenges on substantive due process, equal protection, ex post facto, double jeopardy and procedural due process grounds and upheld the constitutionality of Washington's Statute. *In re Young*, 857 P.2d 989 (Wash. 1993).[1]

Since 1990, additional states have enacted similar statutes[2] and, as such, have a substantial interest in the outcome of this case. Certain of the amici are, as well, considering introducing similar laws. Some amici states have sexual predator civil commitment statutes which are substantively and procedurally somewhat different from the Kansas and Washington statutes--either older "sexual

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[1]The statute was subsequently declared unconstitutional on substantive due process, ex post facto and double jeopardy grounds by the federal district court in *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995). That case was appealed to the Ninth Circuit Court of Appeals and was argued in March 1996. The Ninth Circuit has announced that no further action will be taken on that case pending this Court's decision in the *Hendricks* case.

[2]Kan. Stat. Ann. § 59-29a01 *et seq.*; Wis. Stat. Ch. 980; Cal. Welf. & Inst. Code § 6600 *et seq.*; and Ariz. Rev. Stat. § 13-4601-4609.

psychopath" laws or more modern statutes.[3] All of the amici, however, share a common interest in protecting their citizens from sexually dangerous persons and assert that a narrowly focused civil commitment statute is an appropriate method to do so.

The State of Wisconsin is filing an amicus curiae brief, arguing that commitment under Kansas' Sexually Violent Predator Act does not constitute punishment, and does not violate constitutional prohibitions against ex post facto and double jeopardy laws. The State of Washington and amici approve and adopt amicus State of Wisconsin's arguments regarding ex post facto and double jeopardy.

ARGUMENT

KANSAS' SEXUALLY VIOLENT PREDATOR LAW FULLY COMPORTS WITH THE SUBSTANTIVE DUE PROCESS.

In 1994, Kansas enacted a sexually violent predator statute modeled on Washington's statute. Like Washington's statute, Kansas' Sexually Violent Predator Act provides for commitment of persons who have been convicted of or charged with a sexually violent offense and who suffer from a "mental abnormality or personality disorder"; a mental abnormality, in turn, is defined as:

> a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

Kan. Stat. Ann. § 59-29a02(b).

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[3] *See, e.g.*, Minn. Stat. § 253B.02, subd. 18b (1994) (newer law).

The Kansas Supreme Court struck down Kansas' Sexually Violent Predator Act, declaring that it permitted the detention of persons who, while dangerous, are not "mentally ill" in violation of this Court's holding in *Foucha v. Louisiana*, 504 U.S. 71 (1992). At the core of the question of the constitutionality of Kansas' law is the fundamental issue of whether a State, within reasonable limits, has the power to identify and define those mental conditions which, when combined with a showing of dangerousness, permit the State to civilly commit an individual for the safety of others. The Kansas Supreme Court's opinion is based on the flawed assumption that the State, in formulating laws related to the civil commitment of mentally disordered citizens, is restricted to specific or "medical" definitions of the term "mental illness." This Court, however, has never attempted to impose this requirement on the states. Instead, this Court has historically permitted the states, within reasonable limits, to identify and define those mental conditions which, when combined with a showing of dangerousness, merit civil commitment. Kansas' Sexually Violent Predator Act, by requiring proof of a mental abnormality or personality disorder which makes the individual likely to commit predatory acts of sexual violence, fully comports with the requirements of due process.

Kansas, and those other states which have adopted similar laws, have a compelling interest in protecting their citizens from mentally disordered sex offenders by confining them to secure facilities and by treating them so that they may eventually be safely released into the community.[4] These two goals are the primary

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[4] These amici concur with Kansas that strict scrutiny should not apply to the question of whether Kansas' Sexually Violent Predator Act comports with due process. Even if this Court were to apply such

justifications for the Statute. Kansas' Sexually Violent Predator Act is narrowly tailored to achieve this compelling interest by civilly committing for treatment a small group of clearly defined sex offenders who, by virtue of a mental abnormality or personality disorder, are dangerous to others. As such, the law satisfies constitutional standards.

A. Kansas' Sex Predator Statute Is Fundamentally Different From That Invalidated in *Foucha*.

The Kansas Supreme Court determined that the Kansas law, like the statute struck down by this Court in *Foucha*, permits the detention of persons not mentally ill on the basis of dangerousness alone. The court's reliance on *Foucha* is misplaced. The statute considered in *Foucha*, unlike Kansas' Sexually Violent Predator Act, contained no requirement of mental pathology whatsoever and is therefore fundamentally different than that at issue here.

In *Foucha*, this Court declared unconstitutional a Louisiana statute that governed the State's authority to detain insanity acquittees who, although not "mentally ill," were dangerous to themselves and others. Under Louisiana law, a person once committed as not guilty by reason of insanity remained committed until he could demonstrate that he was no longer dangerous. Louisiana Code of Crim. Proc. 654-58. After the initial commitment, there was no continuing requirement that the person committed be insane or mentally ill. Discharge after the initial commitment was dependent, not upon a restoration of sanity or mental health, but upon the person's ability to demonstrate that he presented no danger to himself or others. Finally, the individual, not the State, bore the burden of showing a lack of continued dangerousness.

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scrutiny, however, the Statute passes constitutional muster because it is narrowly tailored to serve a compelling state interest.

The *Foucha* Court considered a statute which was fundamentally different from the statute at issue here. The statute at issue (1) authorized indefinite detention in the absence of any showing of any mental pathology whatsoever, (2) placed the burden of showing the absence of dangerousness on the detainee, and (3) was being used to hold an individual whom all parties agreed was neither "mentally ill" nor "treatable."[5] In contrast, Kansas' law (1) requires that the State prove the existence of a mental pathology that has the specific effect of predisposing the individual to commit sexually violent crimes; (2) requires that this showing be made beyond a reasonable doubt (Kan. Stat. Ann. § 59-29a07(a)) to a unanimous jury (*Id.*); and (3) requires that persons subject to its terms be treated. Clearly, Terry Foucha could not be held under Kansas' law. In this case, however, the Kansas Statute is being applied to Leroy Hendricks, a pedophile with a 40 year history of sexual offenses against children who testified at trial that only his death would ensure that he would not reoffend. As the statutes are fundamentally different, so, too, are the individuals to whom they are being applied.

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[5]The uncontroverted evidence at trial was that Terry Foucha was "in good shape" mentally. *Foucha*, 504 U.S. at 74. A report submitted to the trial court stated that there had been "no evidence of mental illness since his admission." *Id.* The various physicians who had assessed Foucha determined, however, that Foucha suffered from an "antisocial personality, a condition that is not a mental disease and that is untreatable." *Id.* Thus, this Court began with the premise, not applicable here, that Foucha, although suffering from an "antisocial personality" and "dangerous," was *not* "mentally ill."

B. States Are Not Limited By Due Process To a Specific Or Narrow Definition of "Mental Illness" in Civil Commitment Statutes.

In concluding that the Kansas law permits the detention of persons not mentally ill, the Kansas Supreme Court appears to adopt the position that the term "mentally ill," as used by this Court, denotes a specific or precise medical condition. The court's holding suggests as well that a civil commitment statute, in order to withstand due process challenge, must use the term "mentally ill" to describe those to whom its terms apply or, in the alternative, must subscribe to a particular or "medical" definition of this phrase.

A review of this Court's precedents, however, provides no support for these positions. This Court has never embraced a single definition of the term "mental illness" as used in the context of due process, much less required the states to use any particular label to denote the mental condition required for civil commitment. Over the years, this Court has upheld statutory schemes providing for civil commitment using a variety of formulations. The Court's restraint on this issue reflects both the Court's acknowledgement of the inexact nature of the science of psychology as well as the Court's historical policy of giving the states broad discretion, as part of their police power, to protect society against persons who are suffering from mental disorders and are dangerous to themselves or others.

1. This Court has historically used the term "mentally ill" interchangeably with a variety of terms identifying mental pathologies justifying commitment.

In *Foucha*, this Court invalidated a statute which permitted detention of persons who, while dangerous, were

not "mentally ill." In order to understand this result, however, it is critical to understand that the Court, throughout its history, has used the term "mentally ill" interchangeably with a variety of other terms descriptive of mental pathology and without reference to any precise or "medical" definition.

The Court first articulated this position in *Addington v. Texas*, 441 U.S. 418 (1979). In *Addington*, the issue before the Supreme Court was one of procedural due process: what standard of proof was required by the Fourteenth Amendment to involuntarily commit an individual for an indefinite period of time to a state mental hospital. Because all parties agreed that Addington was "mentally ill," the Court neither discussed nor attempted to define the term "mental illness." Throughout the opinion, however, the Court used a variety of terms interchangeably. For example, the Court described the State's interest as follows:

> The State has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of *emotional disorders* to care for themselves. The State also has authority under its police powers to protect the community from the dangerous tendencies of some who are *mentally ill*. . . . The expanding concern of society with problems of *mental disorders* is reflected in the fact that in recent years many states have enacted statutes designed to protect the rights of the *mentally ill*.

Addington, 441 U.S. at 426 (emphasis added).

Since *Addington*, the Court has continued to use a variety of such terms and phrases interchangeably. In *Jones v. United States*, 463 U.S. 354 (1983), the Court, for

example, used the term "mental illness" interchangeably with "insanity." 463 U.S. at 363. Two years later, the Court, in considering the civil commitment proceedings under Illinois' Sexually Dangerous Persons Act, referred to the statutorily defined "mentally disordered" sexually dangerous persons as a part of "the larger class of *mentally ill* persons who might be found sexually dangerous." *Allen v. Illinois*, 478 U.S. 364, 370 (1986) (emphasis added). In *United States v. Salerno*, 481 U.S. 739 (1987), the Court approved the detention of "*mentally unstable* individuals who present a danger to the public." *Id.* at 748-49 (emphasis added). More recently, in *Washington v. Harper*, 494 U.S. 210 (1990), the Court considered a statute that permitted the State to administer involuntary treatment with antipsychotic drugs to prisoners who suffered from a "mental disorder." Although the hospital policy at issue spoke in terms of the treatment of persons with "mental disorders," the Court refers throughout its opinion to the treatment of the "mentally ill." *Id.* at 213, 227.

This Court has, over the course of the last 17 years, used a variety of terms without any precise definition to describe that mental condition required for civil commitment. Nothing in these opinions requires that Kansas use a specific term to describe the mental pathology of sexual predators it seeks to civilly commit, or to define that pathology in any specific, or "medical" way.

2. The psychiatric profession does not use any single, uniform definition of "mental illness."

The fact that the term "mental illness" is used interchangeably with any number of other phrases connoting mental imbalance is best explained by the fact

that the term "mental illness," although medical in origin[6] has, over the years, been largely abandoned by psychiatry. The American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (DSM-IV), for example, includes no reference whatsoever to the term. Likewise, the Longman Dictionary of Psychology and Psychiatry defines "mental illness" simply as "mental disorder," and conversely defines "mental disorder" as "mental illness." Longman Dictionary of Psychology and Psychiatry 451 (Robert M. Goldenson ed., 1984).

That the concept is not uniformly defined is well illustrated by the varying definitions offered by the Washington State Psychiatric Association (WSPA).[7] A consistent proponent of the argument that, in order to satisfy due process, a commitment statute must comport with a medical definition of "mental illness," the WSPA submitted amicus curiae briefs before the Washington State Supreme Court, the federal district court, and the Ninth Circuit Court in the *Young* litigation. While repeatedly arguing for judicial adherence to a "medical" definition of "mental illness," the WSPA has, to date, failed to provide any evidence of the existence of such a definition and has,

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[6]The terms "mental illness" or "mental disease" were used in the 19th century to refer to a physical disease of the brain. Physicians believed that the strange hallucinations and emotions of the "insane" were caused or accompanied by anatomical or physiological changes in the brain. N. Dain, *Concepts of Insanity in the United States, 1789-1865*, 16, 26, 64, 70 (1964); I. Ray, *A Treatise on the Medical Jurisprudence of Insanity*, (1838).

[7]The parties to this litigation have been notified that the WSPA intends to submit an amicus curiae brief on behalf of Mr. Hendricks.

in fact, suggested no fewer than three different definitions of "mental illness."

Initially, in its amicus curiae brief to the Washington Supreme Court, submitted on behalf of Mr. Young in 1991, the WSPA defined mental illness as:

> a clinically significant behavioral or psychological syndrome or pattern that is associated with present distress, disability, suffering or loss of freedom.

Appendix A. This definition is, of course, essentially identical to the definition of *mental disorder* set forth in the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. rev. 1987) (DSM-III-R) and DSM-IV, where it is defined as:

> *clinically significant behavioral or psychological syndrome or pattern that* occurs in a person and that *is associated with present distress* (a painful symptom) or *disability* (impairment in one or more important areas of functioning) or with a significantly increased risk of *suffering*, death, pain, disability *or* an important *loss of freedom*.

DSM-III-R at xxii; DSM-IV at xxi (emphasis added).

Three years later, the WSPA submitted another amicus brief in the case of *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995). There, the WSPA argued for a definition of "mental illness," which essentially describes psychosis: "mental illness," the WSPA wrote, requires that the individual "must be suffering from severe cognitive impairments which create substantial and enduring loss of contact with reality" (Appendix B). Most recently, in its amicus brief submitted before the Ninth Circuit in *Young v. Weston*, WSPA asserted that

> it is widely understood in the psychiatric profession that to be identified as "mentally ill," a person must be suffering from a serious cognitive, perceptual or affective dysfunction which significantly impairs that person's ability to function in ordinary life.

Appendix C.

These various definitions illustrate the point that the mental health profession does not adhere to any single or uniform definition of the term "mental illness." The Court, of course, has long recognized this fact, noting that psychiatry is not "an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985); *see also O'Conner v. Donaldson*, 422 U.S. 563, 583 n.5 (Burger, C. J., concurring) (1975) ("Indeed, there is considerable debate concerning the threshold questions of what constitutes 'mental disease.'").

Even assuming that mental health professionals could agree upon a uniform definition of "mental illness," adoption of this definition for due process purposes would be a serious error. In the context of civil commitment, the term "mental illness" serves primarily a legal, not a medical, function. Law and medicine address different problems and serve different purposes:

> Medicine's purpose is to diagnose and cure individuals who are ill. While treatment may be a purpose of the law in civil commitment, the law also reflects broader, sometimes conflicting purposes including maintaining a peaceful and safe community. Accordingly, while the law ought to take into account medical and psychological knowledge in order to avoid becoming

> arbitrary, it must not let itself be unduly constrained by medicine. If the law refused to act beyond the frontiers of the scientific disciplines of biology, sociology or psychology, the law might well fail in its legal duties to punish, to compensate or to protect. Medicine and law should act at cross purposes as little as possible, but because each discipline is a separate discipline, some incongruity between categories, process, and the like is not only acceptable, but to be expected.

Katherine P. Blakey, Note, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is An Appropriate Legal Compromise Between 'Mad' and 'Bad' - A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 227, 259-60 (1996).

Within reasonable bounds, questions of the circumstances under which the mentally unstable and dangerous should be incapacitated for their own protection or the protection of society are issues of policy, not science. As such, they are appropriately left to those entities historically responsible for the formulation of such policy--the states.[8]

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[8]This issue has perhaps most frequently arisen in the context of the use of the insanity defense. Because "the choice of a test of legal insanity involves not only scientific knowledge but questions of basic policy . . .," *Leland v. Oregon*, 343 U.S. 790, 800 (1952), the formulation of that policy or policies is best left primarily to the legislative bodies of the various states. *Powell v. Texas*, 392 U.S. 514, 535-36 (1968) (plurality opinion) ("The doctrines of . . . [criminal responsibility] have historically provided the tools for a constitutionally shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the states.").

3. This Court has never embraced a single definition of the term "mental illness."

This Court has never attempted to restrict the states' power to civilly commit mentally disturbed persons by imposing a single, uniform definition of "mental illness" and has over the years upheld numerous statutes that formulate the requisite mental condition in a variety of ways.

In 1940, this Court upheld a statute that provided for the indeterminate commitment of sex offenders with a "psychopathic personality" in *Minnesota ex rel. Pearson*, 309 U.S. 270 (1940). The term "psychopathic personality" applied to persons

> who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of their uncontrolled and uncontrollable desire.

Id. at 273. The *Pearson* Court rejected the detainee's argument that this definition was unconstitutionally vague, writing that:

> these underlying conditions, calling for evidence of past conduct pointing to probable consequences, are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime.

Id. at 274. Over 30 years later, the Court considered a statute authorizing commitment of persons "in need of specialized treatment for [their] *mental or physical*

aberration." Humphrey v. Cady, 405 U.S. 504, 507 (1972) (emphasis added). The states, this Court has noted:

> have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise

of this power and the procedures for invoking it vary drastically among the states.

Jackson v. Indiana, 406 U.S. 715, 736-37 (1972) (recognizing a number of bases for involuntary civil commitment, including "defective delinquency laws, sexual psychopath laws, [and] commitment of persons acquitted by reason of insanity").

What, then, are the substantive limitations to a state's powers to civilly commit? This Court has never articulated a precise standard, and has, indeed, repeatedly refused to do so. In *Addington*, a procedural due process case, the Court discussed those substantive limitations in the broadest possible terms:

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from *something more serious than is demonstrated by idiosyncratic behavior.*

441 U.S. at 426-27 (emphasis added). Clearly, under *Addington*, one may not be involuntary committed as "mentally ill" without "something more serious than is demonstrated by idiosyncratic behavior." *Addington* is unequivocal, however, that the judgment as to what constitutes "something more" is a question for the states:

> The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum.

441 U.S. at 431.

This refusal to "constitutionalize" standards for civil commitment and insistence upon deference to reasonable state determinations echoes earlier decisions of this Court. In *Powell v. Texas*, the Court explored the question of whether imposition of criminal sanctions for public intoxication upon a chronic alcoholic violated the constitutional prohibitions against cruel and unusual punishment. The plurality opinion emphasized that the Court had "never articulated a general constitutional doctrine of *mens rea*," 392 U.S. at 535, and it declined, as well, to enunciate a constitutional test for insanity. "Nothing," wrote Justice Marshall, "could be less fruitful for this court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* To do so

> would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. *It is simply not yet the time to write into the*

> *constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or lawyers.*

Id. at 537 (emphasis added).

The law, whose function is to provide for an ordered society and to ensure consistent and equal treatment of those similarly situated, cannot be required to depend entirely upon "the shifting sands of academic thought." *In re the Care and Treatment of Hendricks*, 912 P.2d 129, 149 (Kan. 1996) (Larson, J., dissenting). Rather, the states must be permitted to enact laws that, within reason, define and identify those persons whom the state determines suffer from an ailment of the mind which renders that person dangerous. Particularly when a legislature:

> undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.

Marshall v. United States, 414 U.S. 417, 427 (1974).

C. The Kansas Supreme Court Erred in Concluding That the Statute Permits the Commitment of Persons Not "Mentally Ill."

The Kansas Supreme Court erred when it concluded, based on its misreading of *Foucha*, that, in using the terms "mental abnormality" and "personality disorder," the Legislature had effectively abandoned any requirement of mental illness. This conclusion misapprehends the Court's historical use of the term "mental illness" as well as the purpose and effect of Kansas' law. By adoption of the term "mental abnormality" and use of the established concept of "personality disorder," the Kansas Legislature sought only

to acknowledge the widely recognized fact that those suffering from severe sexual pathologies are distinct--both in the nature of their mental disorders and in their treatment needs--from those persons who are generally regarded as appropriate for commitment under existing involuntary treatment laws. This determination was entirely reasonable and is entitled to due deference. *Jones*, 463 U.S. at 705 n.13.

1. The Legislature appropriately sought to distinguish sex predators from persons subject to commitment under Kansas' general civil commitment statute.

In enacting the Sexually Violent Predator Act, the Kansas Legislature determined that the persons defined as sexually violent predators are inappropriate for involuntary commitment under Kansas' broad civil commitment statute, Kan. Stat. Ann. § 59-2902, and sought to differentiate them from that population. Sexually violent predators, wrote the Legislature, do not have a mental illness "which renders them appropriate for involuntary treatment pursuant to the Treatment Act for Mentally Ill Persons defined in Kan. Stat. Ann. § 59-2901 *et seq.*" *Hendricks*, 912 P.2d at 137. From this language, the Kansas State Supreme Court erroneously concluded, as a matter of due process, that "the Legislature recognizes that sexually violent predators are not mentally ill." *Id.* This conclusion is simply wrong. In the context of Kansas' Sexually Violent Predator Act, the term "mental illness" is not used with reference to any precise or specific medical definition, nor did the Legislature seek to suggest that these persons were not "mentally ill" for due process purposes.[9] Rather, the

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[9]Indeed, to suggest that the Legislature intentionally targeted persons not "mentally ill" for due process purposes is, in essence, to

term "mentally ill" is used simply to refer to those mental conditions that would constitute grounds for civil commitment under the State's general civil commitment law, Kan. Stat. Ann. § 59-2902.

2. Those sex offenders targeted by the statute suffer from recognized mental disorders.

The creation of a second involuntary commitment statute geared specifically towards violent sex predators was essential in order to address both the specific sexual pathologies and the special treatment needs of those persons. The Legislature, far from seeking to exclude the "mentally ill" from the Statute's parameters, sought rather to target a subset of that class, that is, pathologically driven sex offenders. These offenders suffer from a variety of different sexual disorders, or paraphilias. Some of these disorders, such as pedophilia or Sexual Sadism, are expressly included in the DSM-III and IV; others, such as pathologically driven rape, are not. As noted by Dr. Gene Abel, a psychiatrist at Emory University and leader in the field of sexual pathology, the disorders from which these offenders suffer are characterized by "compulsive, repetitive, driven behavior, which at times has no rational, logical rewards [and] appear to fit the criteria of an emotional or psychological illness."[10] That these conditions are properly regarded as mental disorders was again recognized by the Minnesota Supreme Court in *In re Blodgett*, 510 N.W. 2d 910 (Minn. 1994). Rejecting the

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impute to the Legislature an illicit or unconstitutional motive. *See* Petitioner's Brief at 42 n.27.

[10]Gene G. Abel & Joanne L. Rouleau, *Male Sex Offenders*, in *Handbook of Outpatient Treatment of Adults*, 271 (Michael E. Thase et al. eds., 1990).

detained person's claim that he was not "mentally ill," the court wrote:

> The argument against the constitutionality of civil commitment for a psychopathic personality is that the condition is not a mental illness, at least not one medically

recognized, or at least not yet. But while the term "psychopathic personality" is considered outmoded today, the reality it describes is not; this reality, even if it is not currently classified as a mental illness, does not appear to be a mere social maladjustment. . . . Whatever the explanation or label, the "psychopathic personality" is an identifiable and documentable violent sexually deviant condition or disorder.

Id. at 914-15.

The treatment needs of sex offenders are, as well, different than those generally committed under the State's broad civil commitment statute. While many acutely psychotic conditions that may result in civil commitment are responsive to various antipsychotic drugs,[11] conditions such as pedophilia, characterized by intense, recurrent urges, fantasies or behaviors involving sexual contact with children, are treated using a variety of approaches that do not, generally, include medication. Recognized treatment techniques include behavioral reconditioning, relapse prevention, cognitive-behavioral techniques, the enhancement of social skills, family systems approaches, and the addictive model. *See generally Treatment of the Offender, in Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender*, 279-385 (W. L. Marshall et al. eds., 1990); *see also* Barbara K. Schwartz, *Effective Treatment Techniques for Sex Offenders*, 22 Psychiatric

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[11]*See Heller v. Doe by Doe*, 509 U.S. 312 (1993).

Annals 6 (June 1992). In contrast to the case of an acutely psychotic patient who often may be medicated and quickly returned to the community and maintained on medication, the treatment of chronic pedophiles or paraphiliac rapists, given the nature of the treatment modalities employed, is typically of a much longer duration.[12]

3. Kansas' Sexually Violent Predator Act acknowledges the different disorders and treatment needs of sexually violent predators.

The differences between sexually violent predators and those persons suitable for commitment under the State's broad civil commitment statute are reflected in the language and requirements of the Kansas statute. Whereas commitment under the Involuntary Treatment Act is intended to be short term and to return people to the community quickly, the treatment needs of sexually violent offenders is long term. Kan. Stat. Ann. § 59-29a01. Further, the methods of therapy used to treat those committed under Kan. Stat. Ann. § 59-2901 and those committed as sexually violent predators are very different: the "antisocial features" "generally" seen in violent sex offenders render this population "unamenable to existing mental illness treatment modalities." Kan Stat. Ann. § 59-29a01. Far from determining, as the Kansas State Supreme Court suggests, that sex predators are not "mentally ill," the Statute simply acknowledges the clear differences, widely recognized by experts in the assessment and

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[12]This is not to say, of course, that sexual disorders are entirely unresponsive to medication, particularly antiandrogen and hormonal treatment. *See, e.g., The Antiandrogen and Hormonal Treatment of Sex Offenders, in Handbook of Sexual Assault, supra*, at 297. There exists at this time, however, no consensus regarding the effectiveness of any particular drug therapy for repeat offenders.

treatment of sex offenders, between pathologically driven sex offenders and those suitable for commitment under the State's broad civil commitment statute. By establishing a system that provides for the specific treatment needs of serious sex offenders, the Statute promotes the intent of a *civil* statute: treatment and incapacitation.

a. The term "mental abnormality" has meaning to specialists in the treatment and assessment of sex offenders.

The Kansas State Supreme Court correctly notes that the term "mental abnormality" is not included within the DSM-IV and has no clinical definition. *Hendricks*, 912 P.2d at 137. This fact alone, of course, does not invalidate the Legislature's use of that term.

As noted by the *Young* court, "over the years, the law has developed many specialized terms to describe mental health concepts,"[13] and psychologists and psychiatrists are routinely called upon to apply psychological principles to terms of strictly legal or statutory origin. For example, within the context of a criminal proceeding, psychologists and psychiatrists are frequently asked to express an opinion as to whether a particular individual suffers from a "mental disease or defect," is "insane," or "competent." None of these terms has any direct analog in medicine.[14] It is clear, as well,

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[13]*Young*, 857 P.2d at 1001-02 n.5.

[14]Within the context of the criminal law and the insanity defense, the United States Courts of Appeal have repeatedly recognized that "mental illness" is a legal, not a medical category. *See, e.g., United States v. Freeman*, 357 F.2d 606, 622 (2d Cir. 1966) ("[A] test [for 'mental disease' for a criminal responsibility] which permits all to stand or fall upon the labels or classifications employed by testifying psychiatrists hardly affords the court the opportunity to perform its

that the term "mentally ill" in the context of an insanity defense and criminal responsibility may mean something quite different than "mentally ill" in the context of a civil commitment.[15] The question, then, for due process

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function of rendering an independent legal and social judgment."); *United States v. McDonald*, 312 F.2d 847, 850-51, (D.C. Cir. 1962) ("What psychiatrists may consider a 'mental disease or defect' for clinical purposes . . . may or may not be the same as mental disease or defect for the jury's purpose of determining criminal responsibility").

[15]Different legal definitions of "insanity" are employed in the law when different purposes are at stake. *See* Sanford H. Kadish & Stephen J. Schulhofer *Criminal Law and Its Processes: Cases and Materials* 929 (6th ed. 1995) ("Insanity can become an important legal issue in a variety of circumstances. A contract may be unenforceable if one of the parties was insane when the contract was made. A will may be held void if the testator was insane. In the criminal process, insanity can be relevant at several different stages. Of greatest importance to the substantive criminal law, insanity at the time of the offense is usually a defense to a criminal charge. In addition, a person who is insane may not be tried, convicted, or sentenced. Neither may such a person be executed if convicted of a capital offense. Further, under many state statutes, a person who becomes insane while in prison may be transferred to a mental hospital.").

Indeed, the Kansas Supreme Court, while on the one hand suggesting that there is one uniform definition of mental illness, tacitly admits to at least two:

> In addition, the State's own evidence is that Hendricks was being committed even though he does not suffer from mental illness. Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness. Therefore, as applied to Hendricks, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness.

Hendricks, at 20. The court appears to be saying that, because Hendricks was not found to be insane under that state's insanity statute, he cannot now be considered "mentally ill" for purposes of commitment

purposes, is not whether the term "mental abnormality" has a recognized clinical definition, but whether the term, given its statutory definition, has meaning to those mental health professionals, lawyers, judges and juries called upon to employ and interpret the term. The answer to this question is clearly "yes."

b. The term "mental abnormality" describes recognized mental pathologies.

In adopting the term "mental abnormality," the Kansas Legislature selected a term that has long been used by both the law and mental health professions[16] and is "as

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as a sex predator. By referring both to the test for criminal insanity, as well as to Kansas' standard for civil commitment, however, the court is expressly recognizing that at least *two* separate and distinct standards for civil commitment, or mental illness, exist in Kansas: The M'Naghten test, which provides that one is not guilty by reason of insanity if he or she "does not know the nature and quality of his act or where he does not know right from wrong with respect to that act," *State v. Baker*, 819 P.2d 1173, 1187 (Kan. 1991), and the standard for civil commitment under the State's general civil commitment statute. Thus, while the Kansas State Supreme Court tacitly acknowledges the peaceful coexistence of these two separate and distinct standards within Kansas commitment law, it erroneously rejects the possibility of yet a third standard, narrowly tailored to focus on a small group of mentally disordered persons who, because of their mental disorders, pose a serious risk of sexually violent harm to the citizens of that state. Nothing in this Court's due process jurisprudence required this result.

[16]*See, e.g., Palmer v. Ashe*, 342 U.S. 134, 136 (1952) (Palmer spent several years in an institution because of his "mental abnormality."); *O'Conner v. Donaldson*, 422 U.S. at 578 n.2 ("[T]he reality is that some mental abnormalities respond to no known treatment.") (Burger, C. J., concurring); *Humphrey v. Cady*, 405 U.S. 504, 510 n.6 (allowing commitment of persons dangerous "because of a mental or physical deficiency, disorder or abnormality"); *Dower v. Director Patuxent*, 396 F. Supp. 1070, 1081 (D. Md. 1975); *State v.*

susceptible of proof as many of the criteria constantly applied in prosecutions for crime." *Minnesota ex rel. Pearson*, 309 U.S. at 274-75. This is a term that incorporates a number of recognized mental pathologies:

> In using the concept of "mental abnormality" the Legislature has invoked a more generalized terminology that can cover a much larger variety of disorders. Some, such as the paraphilias, are covered in the DSM-III-R; others are not. The fact that pathologically driven rape, for example, is not yet listed in the DSM-III-R does not invalidate such a diagnosis. The DSM is, after all, an evolving and imperfect document. Nor is it sacrosanct. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ("APA") leaders consider to be practical realities. *What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.*

Young, 857 P.2d at 1002 (emphasis added) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U.

Ward, 369 N.W. 2d 293 (Minn. 1985) (dangerous to public because of his "mental or physical deficiency, disorder or abnormality"); *People v. Smith*, 486 P.2d 1213, 1215 (Ca. 1971) (on the question of whether Smith was a danger to the public because of a "mental or physical deficiency, disorder or abnormality").

Puget Sound L. Rev. 709, 733 (1992)). In Hendricks' trial, as well as the numerous trials that have been conducted in Washington since the statute's enactment in 1990, competent experts have been able to offer testimony regarding "the mental pathologies underlying the sex predator condition." *Young*, 857 P.2d at 1002.

At Hendricks' trial, Dr. Befort was able to both interpret and apply the definition of the term "mental abnormality" to arrive at a diagnosis--pedophilia--long accepted by the mental health community. Pedophilia is a type of mental disorder that is expressly recognized in the DSM-IV. DSM-IV at 527-28.

The published opinions of other sex predator cases also demonstrate that experts are able to reach recognized diagnostic categories using the statutory language. At the trial of Andre Young in Washington State, for example, the state's expert, a specialist with over 25 years experience with sex offenders, testified that Young suffered from a mental abnormality in the form of a paraphilia. *Young*, 857 P.2d at 994-95. A paraphilia is a type of mental disorder expressly recognized in the DSM. *See* DSM-IV at 522-25. Young's paraphilia took the form of either Sexual Sadism or Paraphilia Not Otherwise Specified (NOS): Rape. *Young*, 857 P.2d at 994. Sexual Sadism is, of course, a recognized diagnostic category within the DSM-IV. *See* DSM-IV at 530-31. All experts at Young's trial agreed, as well, that Paraphilia NOS: Rape was a legitimate diagnostic category.[17] Young's co-appellant,

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[17]The diagnosis of rape as a paraphilia is recognized as valid by experts in the field of the treatment and assessment of sex offenders. As explained in the seminal article on this mental disorder, read into the record at the *Young* trial:

> Clinical interviews of rapists, however, provide support for the classification of rape as a paraphilia,

Vance Cunningham, was determined by the State's expert to suffer from a severe Paraphilia NOS: Rape. *Id.* at 995.

The experience of the State of Wisconsin has been similar. In *State v. Post*, 541 N.W. 2d 115, 119 (Wis. 1995), Post was diagnosed as suffering from an antisocial personality disorder (DSM-IV at 645) with secondary atypical paraphilia (DSM-IV at 522-23). Post's co-appellant, Oldakowski, was diagnosed as suffering from both Sexual Sadism (DSM-IV at 530) and Exhibitionism (DSM-IV at 525-26) and secondarily from a Personality Disorder, Not Otherwise Specified (DSM-IV at 673). *Post*, 541 N.W. 2d at 119. In addition, William Carpenter was diagnosed as suffering from pedophilia and an antisocial personality disorder (DSM-IV at 645-50). *State v. Carpenter*, 541 N.W. 2d 105, 108 (Wis. 1995); Carpenter's co-appellant, William Schmidt, was diagnosed as a pedophile. *Id.* at 109. Accordingly, all available evidence points to the conclusion that mental health and legal professionals are able to work with the legislatively

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> because many individuals report having recurrent, repetitive, and compulsive urges and fantasies to commit rapes. These offenders attempt to control their urges, but the urges eventually become so strong that they act upon them, commit rapes, and then feel guilty afterwards with a temporary reduction of urges, only to have the cycle repeat again. This cycle of ongoing urges, attempts to control them, breakdown of those attempts, and recurrence of the sex crime is similar to the clinical picture presented by exhibitionists, voyeurs, pedophiles, and other traditionally recognized categories of paraphiliacs.

Gene G. Abel & Joanne L. Rouleau, *The Nature and Extent of Sexual Assault, in Handbook of Sexual Assault, supra*, at 9, 18, *cited in Young*, 857 P.2d at 1002; *see also* A. Kenneth Fuller, M.D., et al., *Paraphiliac Coercive Disorder, in* 16 *Journal of Sex Education and Therapy* 3, 164-71 (1990).

created and defined term "mental abnormality" in order to arrive upon well-established, widely recognized diagnoses accepted by others in the mental health professions.

c. The term "mental abnormality" fully complies with the requirements of substantive due process.

The Kansas Supreme Court suggests that the use of the terms "mental abnormality" and "personality disorder" was proof that the Legislature intended, contrary to due process, that the Statute capture those who were not actually mentally ill, by evoking a circular definitional structure in which "the only observed characteristic . . . is the predisposition to commit sex crimes." *Hendricks*, 912 P.2d at 19 (quoting *Young v. Weston*, 898 F. Supp. at 750).[18]

The court's suggestion that the terms "personality disorder" and "mental abnormality" are circular is inaccurate and suggests that the court does not understand the process by which psychiatric diagnoses are made. The mental health professions' understanding of the origin of mental disorders is incomplete: some conditions are known to have a biological or organic basis; in other cases, the etiology is unknown. DSM-III-R at xxiii. Because a psychologist cannot determine the presence of most mental disorders by, for example, taking a blood sample, the diagnosis of most disorders must be based, to a greater or lesser degree, on inference. Those inferences, in turn, are based on the data available to the clinician. Some of these

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[18]Hendricks' commitment is based exclusively upon the presence of a mental abnormality. As such, the issue of the constitutional sufficiency of a commitment based on a personality disorder alone is not presented by this case. Accordingly, this question will not be addressed in this brief.

data will be objective (e.g., in the case of a diagnosis of pedophilia, the information that an assault on a child has occurred); other data will be subjective (as, for example, in the case of a diagnosis of major depressive episode, the subjective presence of a depressed mood, DSM-IV at 339). The available data--both subjective and objective-- are then cross-referenced with the diagnostic criteria established by the profession and set forth in the DSM. DSM-III-R at 15-24. This is the process by which sexual disorders are diagnosed; it is also the process by which psychotic disorders and mood disorders are diagnosed. The DSM itself notes that these definitions of the various disorders

> can be said to be "descriptive" in that the definitions of the disorders are generally limited to descriptions of the clinical features of the disorders.

Id. at xxiii. In this sense, then, all psychiatric diagnosis is "circular." To suggest that this "circularity" is unique to the diagnosis of conditions forming the basis of the sex predator condition, or in some way renders an expert's determination that someone is a sexually violent predator meaningless, reveals a serious lack of understanding of the process by which all psychiatric diagnoses are reached.

CONCLUSION

Kansas' Sexually Violent Predator Statute, by providing for the civil commitment of persons suffering from mental abnormalities or personality disorders that make them likely to reoffend, fully complies with the requirements of due process. As such, the decision of the

Kansas Supreme Court should be reversed and the Statute upheld.

Respectfully submitted,

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APPENDIX A

From Brief of Amicus Curiae Washington State Psychiatric Association in Support of Petitioners submitted to the Washington State Supreme Court in *In re the Personal Restraint of: Andre Brigham Young and Vance Russell Cunningham*, cause no. 57837-1, on pages 2-3:

Mental illness is a clinically significant behavioral or psychological syndrome or pattern that is associated with present distress, disability, suffering, or loss of freedom. American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (Third Edition, Revised, 1987), p. xxiv. To label accurately any individual as "mentally ill" within the medical meaning of that term, a mental health professional must first diagnose that individual. Diagnosis requires an identification of symptoms and a comparison of those symptoms with clinically recognized diagnostic criteria. If the individual meets the diagnostic criteria set forth in the above-mentioned Manual (hereafter, the DSM III-R), the

individual can be diagnosed as suffering from a medically recognized mental disorder.

APPENDIX B

From Amicus Brief Submitted by Washington State Psychiatric Association on Behalf of Petitioner to the United States District Court, Western District of Washington at Seattle, in *Andre Brigham Young v. David Weston*, cause no. C94-480C, on pages 1-2:

It is well accepted in modern psychiatry that "mental illness" requires, as a threshold determination, the existence of a mental disorder. A mental disorder is a "clinically significant behavioral or psychological syndrome or pattern that is associated with present distress, disability, suffering, or loss of freedom." *Diagnostic and Statistical Manual* (Fourth Edition), published by the American Psychiatric Association, 1994, at p. xxiv.

To label accurately any individual as "mentally ill" within the medical meaning of that term involves a two step process. First, a mental health professional must diagnose that individual as suffering from a mental disorder. Diagnosis requires an identification of symptoms and a comparison of those symptoms with diagnostic criteria for

a medically recognized mental disorder as set forth in an authoritative text such as the above-mentioned Manual (hereafter, the DSM-IV).

If the individual is found to suffer from a mental disorder, it would next be determined whether the disorder is of a type and severity which would merit the label "mental illness" for the purpose of either voluntary or involuntary commitment in a psychiatric hospital for treatment.[1] The term "mental illness" is not widely used in psychiatry today, except in a forensic context where statute or case law requires a finding of mental illness as a prerequisite to involuntary commitment. Given this context, it is widely understood in the psychiatric profession that to merit the label "mentally ill", a person ordinarily must be suffering from severe cognitive

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[1]Some disorders, such as schizophrenia, commonly lead to a diagnosis of mental illness. Other mental disorders would rarely, if ever, lead to such a diagnosis; e.g., Caffeine Induced Sleep Disorder (DSM IV, p. 601).

impairments which create substantial and enduring loss of contact with reality.

APPENDIX C

From Brief of Amicus Curiae Washington State Psychiatric Association in Support of Petitioner/Appellee to the United States Court of Appeals for the Ninth Circuit in *Andre Brigham Young v. David Weston*, cause no. 95-35958, on page 2 and page 3:

Accurately labeling any individual as "mentally ill" involves a two step process. First, a mental health professional must diagnose that individual as suffering from a mental disorder based on diagnostic criteria as set forth in an authoritative text such as the DSM-IV.

If the individual is found to suffer from a mental disorder, it would next be determined whether the disorder is of a type and severity which would merit the label "mental illness" for the purpose of either voluntary or involuntary commitment in a psychiatric hospital for treatment. . . .

What, then, is necessary for a diagnosis of "mental illness?" In the context of involuntary commitment, it is widely understood in the psychiatric profession that to be

identified as "mentally ill," a person must be suffering from a serious cognitive, perceptual or affective dysfunction which significantly impairs that person's ability to function in ordinary life.